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REVISITING THE OUTCOME MATERIALITY PRINCIPLE IN CRIMINAL SENTENCING

In recent years, the Singapore courts have increasingly justified that the outcome of an offender's criminal act must be taken into account in determining the appropriate severity of punishment to be imposed on an offender because "the outcome materiality principle trumps the control principle". As explained in this article, the outcome materiality principle is predicated on the existence of resultant moral luck – *viz*, the extent of an offender's blameworthiness is affected by the outcome of his or her criminal act. However, there are two major difficulties with the courts' endorsement of resultant moral luck: (a) the courts have not offered any compelling reasons in favour of resultant moral luck; and (b) the courts have misapprehended the true nature of the outcome materiality principle, as well as the moral intuition that it articulates. Given these difficulties, it is respectfully contended that the courts should steer clear from the justificatory explanation that the outcome materiality principle trumps the control principle.

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I. Introduction

1 It is well established in Singapore that the outcome of an offender's ("D") criminal act should be taken into account by the courts in determining the appropriate severity of punishment to be imposed.[2] In general, the greater the harm caused by D's criminal act, the harsher the punishment visited on D. Yet, differences in the outcome of D's criminal act are invariably subject to factors beyond his or her control. For instance, D may fire a gun with the intention to kill the victim, but "details like whether the victim was wearing a bullet-proof vest at the material time or whether a bird flew into the path of the bullet can result

1 The author is grateful to Assistant Professor Benny Tan, Assistant Professor Robin Zheng and Professor Andrew Simester for their patience and helpful comments on earlier drafts of this article. All errors, however, remain the author's.

2 See, *eg*, *Public Prosecutor v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [29] and *Public Prosecutor v Teo Poh Leng* [1991] 2 SLR(R) 541 at [10].

in dramatically different outcomes".[3] Similarly, D may negligently drive into a traffic junction against the red light, but whether D collides into another vehicle and the precise extent of harm caused thereby are matters left to luck. This phenomenon where the outcome of D's criminal act can affect the extent of his or her legal liability – specifically, the severity of punishment imposed – is also known as "resultant legal luck".[4]

2 How is resultant legal luck in the context of criminal sentencing justified by the Singapore courts? In recent years, the courts have increasingly appealed to one particular justificatory explanation – *viz*, that "the outcome materiality principle trumps the control principle".[5] The outcome materiality principle, as will be explained in this article, reflects the notion of "resultant moral luck", that is to say, the extent of D's blameworthiness is affected by the outcome of his or her criminal act. Seen in this light, the justificatory explanation that the outcome materiality principle trumps the control principle is predicated on the validity of resultant moral luck.

3 There are, however, two major difficulties with the courts' endorsement of resultant moral luck. The first is that the reasons that the courts have offered in favour of resultant moral luck are, on closer inspection, not quite relevant to the extent of D's blameworthiness for his or her past offence. Therefore, these reasons cannot validate the existence of resultant moral luck. The second difficulty is that the courts have misapprehended the true nature of the outcome materiality principle, as well as the moral intuition that it articulates. Contrary to common assumptions, the widely felt intuitive belief that outcomes matter to moral judgments does not point towards the existence of resultant moral luck. Rather, outcomes intuitively matter to our moral judgments about the extent of D's blameworthiness only in so far as they are often useful epistemic proxies to assess the deficiencies of the manner and motivations of D's involvement in the criminal act.

4 Given these difficulties with endorsing resultant moral luck, it is respectfully contended in this article that the courts should steer clear from the justificatory explanation that the outcome materiality principle trumps the control principle. It is unnecessary to appeal to this justificatory explanation in order to defend resultant legal luck because there are other potential justificatory grounds that the courts may explore and, if feasible, adopt in future cases. Therefore, the courts should

3 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [70].
4 David Enoch, "Moral Luck and the Law" (2010) 5 Phil Compass 42 at 48.
5 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [68]–[70]. The outcome materiality principle and control principle are defined and discussed further in Part II below.

reconsider its approach towards the justification of resultant legal luck in respect of criminal punishment.

II. "The outcome materiality principle trumps the control principle"

5 Why do the Singapore courts take the full extent of harm caused by D's criminal act into account in calibrating the severity of punishment to be imposed? In the past decade, one particular justificatory explanation has become increasingly popular, which is helpfully summarised by the High Court in *Nurun Novi Saydur Rahman v Public Prosecutor*[6] ("*Nurun Novi Saydur Rahman*") as follows:[7]

> The theoretical underpinning for taking the actual harm caused into account in calibrating a sentence, even where an offender is negligent, is the fact that Singapore courts have endorsed the position that the outcome materiality principle trumps the control principle in the context of criminal negligence. The outcome materiality principle is the 'intuitive moral sense that outcomes do matter', and hence the outcome of any criminal act, *ie*, the actual harm caused, should be taken into account in sentencing. The control principle is the 'intuitive moral sense that people should not be morally assessed for what is not their fault'. This tension between the two principles is particularly pronounced in situations where negligence is criminalised, because an offender is generally in less control of the result of his/her negligent act as opposed to situations where criminal acts are committed intentionally.

The High Court attributed the justification for resultant legal luck to "the position that the outcome materiality principle trumps the control principle". It is important to note in this regard that both the outcome materiality principle and control principle are portrayed as articulating intuitive beliefs that bear on *moral judgments* about the individual. On the one hand, the control principle provides that "people should not be morally assessed for what is not their fault", that is to say, "for that which is beyond [their] control". On the other hand, the outcome materiality principle "is the brute principle that moral … assessments often depend on factors that are beyond the actor's control". Therefore, by declaring that the outcome materiality trumps the control principle, the implication is clear – it was decided that the outcome of D's criminal act affects moral judgments concerning D herself, notwithstanding that differences in the extent of harm caused by D's criminal act are necessarily subject to factors beyond his or her control.

6 [2019] 3 SLR 413.
7 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [82].

6 In *Nurun Novi Saydur Rahman*, the justificatory explanation that the outcome materiality principle trumps the control principle was relied upon only in relation to the context of criminal negligence. Nevertheless, the courts have also appealed to this explanation across different contexts *outside* of criminal negligence. For example, the High Court in *Public Prosecutor v Lim Choon Teck*[8] held that "the outcome materiality principle also trumps the control principle in the context of criminal rashness".[9] Likewise, this justification was also invoked in relation to the offence of not disclosing the risk of HIV transmission – whether intentionally or otherwise – to persons with whom D (a HIV-positive individual) has sexual activity under s 23(1) of the Infectious Diseases Act.[10] In *GCP v Public Prosecutor*, the High Court held that harsher penalties must be imposed on D whenever HIV is actually transmitted as a result of such offence to "give sufficient weight to the outcome materiality principle".[11]

7 A precursor of this justificatory explanation that the outcome materiality principle trumps the control principle can also be found in *Lai Jenn Wuu v Public Prosecutor*[12] ("*Lai Jenn Wuu*") The appellant in that case was convicted of the offence of forgery.[13] The appellant failed to occasion any loss as a result of his act of forgery because the bank had promptly identified that the cheque presented by the appellant was forged. Since no loss resulted from his criminal act, the appellant argued that he was entitled to a lighter sentence. This argument was rejected by the district judge, who held that such outcome was irrelevant to the appellant's sentence as it was not to his credit that he failed to occasion such loss despite his best efforts.[14]

8 The High Court disagreed. It was held that "the appellant is *entitled* to some degree of advantage from the fact that no loss was caused by his forgery, however fortuitous that consequence was"[15] [emphasis added]. The High Court observed that "[t]he consequences of a person's actions are often if not invariably dependent on things that are outside that person's control, and hence two people may carry out identical

8 [2015] 5 SLR 1395.
9 *Public Prosecutor v Lim Choon Teck* [2015] 5 SLR 1395 at [35]. See also *Public Prosecutor v Ganesan Sivasankar* [2017] 5 SLR 681 at [31]–[32].
10 Cap 137, 2003 Rev Ed.
11 *GCP v Public Prosecutor* [2019] 5 SLR 626 at [70].
12 *Lai Jenn Wuu v Public Prosecutor* [2013] 4 SLR 1134.
13 Penal Code (Cap 224, 2008 Rev Ed) s 465.
14 *Public Prosecutor v Lai Jenn Wuu* [2013] SGDC 14 at [13].
15 *Lai Jenn Wuu v Public Prosecutor* [2013] 4 SLR 1134 at [4].

acts with identical intentions that nevertheless result in vastly differing outcomes".[16] In this connection, the following illustration was provided:[17]

> Take a situation in which person A and person B both aim a gun at a third person and pull the trigger intending to kill, and A's gun fires a bullet as planned killing his target but B's gun jams and no bullet is fired.

The High Court acknowledged that "[o]n one view, A and B are equally blameworthy because they carried out identical acts with identical intentions".[18] However, the High Court proceeded to observe that:[19]

> Yet, the criminal law distinguishes between the two in that A would be liable for murder while B would be liable only for an attempt to murder, which carries a less severe punishment than murder. The broader point of which this hypothetical situation is an illustration is that the criminal law recognises that even consequences which are beyond an offender's control can be relevant in determining the appropriate punishment for that offender. Sustained analysis might perhaps reveal this to be an irrational moral instinct or intuition, but it is too entrenched a feature of the criminal law to be disregarded.

9 There are clear parallels between the two moral intuitions described in *Nurun Novi Saydur Rahman* (*viz*, the outcome materiality principle and the control principle) and the two views portrayed in *Lai Jenn Wuu*. The first view embodies the intuitive moral sense as stated in the control principle that moral judgments relating to A and B should not be affected by the outcomes of their respective criminal acts – they are "equally blameworthy because they carried out identical acts with identical intentions". The second view, on the other hand, seems to embody the outcome materiality principle in so far as it portrays an apparently contradictory moral intuition that outcomes do matter that would, consequently, demand differences in the severity of punishment imposed on them.

10 According to the High Court in *Lai Jenn Wuu*, such intuition "is too entrenched a feature of the criminal law to be disregarded" and, hence, must prevail over the first view. Effectively, the High Court was justifying resultant legal luck on the basis that the outcome materiality principle trumps the control principle across the criminal law. Indeed, the leading local sentencing textbook, *Sentencing Principles in Singapore*,

16 *Lai Jenn Wuu v Public Prosecutor* [2013] 4 SLR 1134 at [4].
17 *Lai Jenn Wuu v Public Prosecutor* [2013] 4 SLR 1134 at [4].
18 *Lai Jenn Wuu v Public Prosecutor* [2013] 4 SLR 1134 at [4].
19 *Lai Jenn Wuu v Public Prosecutor* [2013] 4 SLR 1134 at [4].

treats the High Court in *Lai Jenn Wuu* as having "explained the outcome materiality principle" in the passages cited above.[20]

III. Endorsing resultant moral luck

11 This justificatory explanation that the outcome materiality principle trumps the control principle is significant – properly understood, it endorses the validity of "resultant moral luck".

12 It is important to note that the term "resultant moral luck" is a philosophical term of art. Resultant moral luck describes the phenomenon whereby the outcome of an individual's acts affects the extent to which he or she deserves more or less blame for those acts, notwithstanding that it was subject to factors beyond his or her control.[21] In this regard, resultant *moral* luck should not be confused with resultant *legal* luck. The former speaks to the significance of outcomes to *moral judgments* about the extent of D's blameworthiness, whereas the latter speaks to the significance of outcomes to D's *legal liabilities* – in the context of this article, in respect of criminal punishment.

13 That said, resultant moral luck may offer useful retributivist grounds to justify resultant legal luck through the following argument:[22] if (a) the extent of D's blameworthiness in respect of the offence depends on the outcomes of the criminal act – in other words, that there is resultant moral luck; and if it is granted that (b) the retributivist rationale of criminal punishment is concerned with accurately communicating the blame that D deserves for the offence by imposing punishment that is proportionate thereto;[23] (c) then assuming all else being equal, the severity of punishment that should be imposed on D for the offence

20 Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2nd Ed, 2019) ch 11, at para 11.032.

21 David Enoch, "Moral Luck and the Law" (2010) 5 Phil Compass 42.

22 David Enoch, "Moral Luck and the Law" (2010) 5 Phil Compass 42 at 49.

23 The rationale assumed here is widely accepted in the criminal law theory literature: see, *eg*, R A Duff, *Punishment, Communication, and Community* (Oxford University Press, 2003) at pp 27–30; Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) at pp 17–21; and John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) at pp 77. It has also been accepted by the Singapore courts: see, *eg*, *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [38] ("every sentence communicates society's aversion and the proper degree of censure for the offending behaviour") and *Public Prosecutor v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [16]. That said, other retributivist rationales have been argued, and the implications of these rationales are discussed in Part V.B.1 below.

should depend on the outcomes of the criminal act – *ie*, resultant legal luck is justified.

14 However, the difficulty with relying on this argument lies with proposition (a) – to begin with, does resultant moral luck exist? This is a controversial philosophical issue that remains the subject of ongoing debate.[24] On the one hand, there are those who believe that there is resultant moral luck on the basis of a strong intuitive force behind the idea that outcomes matter to moral judgments. On the other hand, there are those who deny the existence of resultant moral luck, appealing instead to the moral intuition that "people cannot be morally assessed for what is not their fault, or for what is due to factors beyond their control".[25] Therefore, attempts at justifying resultant legal luck *through* resultant moral luck must necessarily engage in this philosophical debate and, more importantly, overcome the difficult task of proving the validity of proposition (a).

15 In this connection, the Singapore courts appear to be relying on this retributivist rationale when they justify resultant legal luck on the basis that the outcome materiality principle trumps the control principle. The outcome materiality principle and control principle articulate the same two intuitions that lie at the heart of the debate concerning resultant moral luck. Therefore, the courts' introduction of the outcome materiality principle and the control principle had effectively imported these two clashing intuitions from this "difficult philosophical issue" into the case law. More importantly, these two clashing intuitions were resolved by the courts in favour of the outcome materiality principle, which constitutes an endorsement of resultant moral luck.

16 Crucially, this conclusion is buttressed by the fact that explicit references to "moral luck" were made by the courts on two separate occasions. The first can be found in *Public Prosecutor v Hue An Li*[26] ("*Hue An Li*"). It was in this case that the High Court had first issued the declaration that the outcome materiality principle trumps the control principle, albeit specifically in the context of criminal negligence. Having

24 The debate emerged in the 1970s from the articles by Thomas Nagel in *Mortal Questions* (Cambridge University Press, 1979) ch 3 and Bernard Williams in *Moral Luck* (Cambridge University Press, 1981) ch 2. The developments in the resultant moral luck debate since then are usefully summarised by David Enoch's article, "Moral Luck" in Hugh LaFollette, *The International Encyclopedia of Ethics* (Blackwell Publishing, 2013) and Dana Nelkin, "Moral Luck" *Stanford Encyclopedia of Philosophy* (19 April 2019) <https://plato.stanford.edu/entries/moral-luck/> (accessed 22 February 2023).

25 Thomas Nagel, *Mortal Questions* (Cambridge University Press, 1979) at p 25.

26 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661.

done so, the High Court then remarked that "[h]ow *moral luck* should be resolved in other contexts is something that we leave to be explored if and when that issue arises"[27] [emphasis added]. This reference to "moral luck" makes it clear and unequivocal that the High Court was endorsing resultant moral luck.

17 Two years later, the High Court again referred to "moral luck" in *Guay Seng Tiong Nickson v Public Prosecutor*[28] ("*Nickson Guay*"). The appellant in that case was convicted of the offence under s 304A(*b*) of the *Penal Code* for causing the death of an infant seated in the vehicle into which he collided as a result of his negligent driving. The infant was, at the material time, not secured in an approved child restraint as required by law. The appellant thus argued that the sentence imposed on him should be reduced on the basis that the infant would not have died but for the negligence of the infant's father in failing to secure the infant by an approved child restraint. However, the High Court rejected the appellant's argument. After citing the position that the outcome materiality principle trumps the control principle in the context of criminal negligence, the High Court held:[29]

> If what [the offender] is saying is that his sentence should be reduced to reflect the fact that he was 'unfortunate' to have collided with a vehicle in which there was an unrestrained child as opposed to one without, I would reject this submission. There can be no principled basis on which the Court should mitigate the sentence on account of an offender's 'moral (bad) luck'.

Once again, the High Court endorsed resultant moral luck. The tragic outcome of the appellant's driving, though subject to factors beyond his control, altered the court's judgments about the extent of his blameworthiness and, in turn, the degree of retributive punishment imposed on him.

IV. Two difficulties with endorsing resultant moral luck

18 It is argued here that there are two major difficulties with the courts' endorsement of resultant moral luck.

27 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [75].
28 [2016] 3 SLR 1079.
29 *Guay Seng Tiong Nickson v Public Prosecutor* [2016] 3 SLR 1079 at [70].

A. The reasons for resultant moral luck: Revisiting Public Prosecutor v Hue An Li

19 As mentioned earlier, whether there is resultant moral luck is itself a controversial philosophical issue. In order to convincingly justify resultant legal luck in respect of criminal punishment through resultant moral luck, the courts must first offer appropriate reasons to defend the belief that the outcome of D's criminal act affects the extent of D's blameworthiness for the offence. However, we will soon see that the reasons for which the courts endorsed the position that the outcome materiality principle trumps the control principle – which can be found in the High Court's discussion in *Hue An Li* – are not relevant to the issue of whether the outcome of D's criminal act affects the extent of his or her blameworthiness.

(1) The consequentialist objectives of criminal punishment

20 First, the High Court held in *Hue An Li* that a "fundamental" reason to endorse the outcome materiality principle relates to the consequentialist objectives of deterrence, prevention and rehabilitation that, alongside retributivism, inform the aims of criminal punishment.[30] In essence, the suggestion here was that that imposing harsher punishment on D whenever greater harm results brings about or helps to secure one or more of such contingent benefits for the wider societal interest. Such reason was reiterated by the High Court in *Nickson Guay*, which held that that the imposition of severer penalties on negligent drivers who have the misfortune of causing death is borne out of:[31]

> … a recognition of a social necessity to seek to deter, by criminal sanction, unnecessary and unavoidable killings by motor vehicle drivers … most negligence is due to insufficient care being taken and … the degree of care that actors bring to bear in these situations can be increased by means of the penal law …

21 However, even if we assume *arguendo* that consequentialist objectives like deterrence are "fundamental" justifications for resultant legal luck, they do not point us one way or another in respect of whether there is resultant moral luck. Put simply, these consequentialist objectives are irrelevant to judgments about D's blameworthiness – for instance, whether others are more effectively deterred against criminal conduct does not have any relation to whether D deserves more or less blame for the past offence. Indeed, even the High Court in *Hue An Li* acknowledged

30 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [73].

31 *Guay Seng Tiong Nickson v Public Prosecutor* [2016] 3 SLR 1079 at [44], citing *R v Scholes* [1999] 1 VR 337 at [16].

that such consequentialist objectives "go beyond moral assessment", in that they are not concerned with "the moral condemnation of individual offenders".[32] Therefore, it is respectfully submitted that this cannot be an appropriate reason to endorse resultant moral luck.

(2) Legislative intent

22 Next, the High Court in *Hue An Li* argued that the outcome materiality principle must be endorsed because Parliament had "clearly evince[d] an intention … to lean in favour of the outcome materiality principle for sentencing purposes".[33] This argument was offered specifically in relation to the negligence-based offences in the Penal Code, as the respondent in that case was being sentenced for the offence of causing death by a negligent act under s 304A(*b*) of that statute. The High Court drew the conclusion that Parliament preferred the outcome materiality principle from the fact that Parliament had designed the severity of the punishments for such offences to increase along with the extent of harm caused by D's negligent act, as shown in the table below:

Section	Elements	Maximum punishment
336(*b*)	Endangering personal safety by a negligent act	Three months' imprisonment and/or $1,500 fine
337(*b*)	Causing hurt by a negligent act	Six months' imprisonment and/or $2,500 fine
338(*b*)	Causing grievous hurt by a negligent act	Two years' imprisonment and/or $5,000 fine
304A(*b*)	Causing death by a negligent act	Two years' imprisonment and/or fine without any stipulated maximum amount

Hence, the respondent in *Hue An Li* was punishable with a maximum of up to two years' imprisonment, having caused death. Compare this to the situation if no harm resulted from her driving – the respondent could have instead been convicted instead of negligent endangerment *simpliciter* under s 336(*b*), in which case she would have been punishable with a lower maximum of up to three months' imprisonment. Such scaling of punishment may be said to indicate legislative intent for the severity of punishment imposed to increase along with the gravity of the resultant harm for these offences, in which case "the courts' sentencing

32 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [73].
33 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [72].

function must be exercised in accordance with the kinds and range of punishments prescribed by the Legislature".[34]

23 However, it is one thing to say that Parliament wants offenders to be punished depending on the outcomes of their criminal act. It is another thing to say that Parliament "lean[s] in favour of the outcome materiality principle". The former is an inference that Parliament desires there to be resultant *legal* luck in the courts' sentencing practices. By contrast, the latter attributes such desire to Parliament's belief that there is resultant *moral* luck.

24 In this regard, while legislative acts that prescribe punishments depending on the outcome of D's criminal act may evince Parliament's intention for resultant legal luck, such intention cannot be *ipso facto* attributed to legislative beliefs in resultant moral luck. The reason is that this is speculation as to *why* Parliament chose to differentiate the severity of punishments according to the extent of harm caused by D's criminal act. It may well be that Parliament did so not out of any such beliefs that such outcomes affect the extent of D's blameworthiness, but purely on the basis that doing so might advance consequentialist objectives such as deterrence. Hence, it would be too hasty to conclude that Parliament had "clearly evince[d] an intention … to lean in favour of the outcome materiality principle for sentencing purposes".

25 In any event, it bears mentioning that even if this legislative preference for resultant legal luck can be properly attributed to Parliament's beliefs in resultant moral luck, this still adds very little to our inquiry. Surely this longstanding philosophical issue involving matters of moral theory is not resolved just because, inexplicably and perhaps even indefensibly, "Parliament said so".[35]

(3) A countervailing species of (legal) luck

26 Finally, the High Court argued that it would be "only fair" that the outcome materiality principle must be endorsed given that "a countervailing species of legal luck can operate in favour of a putative offender".[36] To this end, the High Court gave the following illustration:[37]

> [T]wo drivers who briefly fall asleep while driving straight at the same speed along the same stretch of road. One driver wakes up before any harm is caused. The other driver collides into and kills a jaywalking pedestrian.

34 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at [49].
35 David Enoch, "Moral Luck and the Law" (2010) 5 Phil Compass 42 at 51.
36 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [74].
37 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [74].

In this regard, the High Court first acknowledged that "[i]t could be said that, as a matter of moral assessment, both drivers are equally culpable".[38]

27 Now, it should be clarified that the term "culpability" is routinely used by the courts to refer specifically to the deficiencies of D's practical reasoning as disclosed by the manner and motivations of his or her involvement in the criminal act in question. Notice that this assessment of culpability is strictly confined to the situation *ex ante*;[39] by contrast, the outcome of D's criminal act is typically assessed separately by the courts as the "harm" that actually occurs in the situation *ex post*.

28 In this regard, this usage of "culpability" is stipulative and may, depending on whether the existence of resultant moral luck is endorsed or denied, be *narrower* in definition than "blameworthiness".[40] For instance, if resultant moral luck was endorsed, then the extent of D's blameworthiness would be concerned with both (a) the level of D's culpability in respect of the criminal act; and (b) the degree of harm caused thereby, in which case D's "blameworthiness" and "culpability" are distinct. However, if the existence of resultant moral luck was denied, then the extent of D's blameworthiness would be identical to the level of D's culpability. Given this stipulative definition of "culpability", the High Court's acknowledgment that both drivers are "equally culpable" should not be misinterpreted to constitute a denial of the existence of resultant moral luck; this would contradict the clear endorsement of resultant moral luck found in other parts of the High Court's judgment in *Hue An Li*.

38 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [74].

39 *Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 1080 at [57].

40 For clarity, the terms "culpability" and "blameworthiness" are often used interchangeably. Yet, this stipulative definition of "culpability" is occasionally used by some writers, as distinct from "blameworthiness": see, *eg*, Michael Moore, *Placing Blame: A Theory of the Criminal Law* (Clarendon Press, 1997) at pp 403–404:

> 'Culpability' is often used to denote an actor's overall moral responsibility (or moral blameworthiness) with respect to some morally bad state of affairs. In this book I have used the word in a narrower sense, one in which culpability is only one of three ingredients in overall blameworthiness … Culpability in this narrower sense focuses on the actor, not the act (as in wrongdoing).

See also Davinia Aziz, "Punishment as Response to Harm: Why the Attempt Warrants Lesser Punishment than the Completed Crime" [2002] Sing JLS 604 at 608: "Instead of merely leaving the equation at 'blame' equals 'culpability', I adopt [the] formulation that 'blame' plus 'harm' equals 'culpability'."

29 Having acknowledged both drivers to be equally culpable, the High Court proceeded to observe that:[41]

> … as a matter of practical fact, the former [who does not cause harm] will not suffer any legal repercussions because no detectable harm has occurred. Putative offenders take the benefit of legal luck operating in their favour if the adverse consequences do not eventuate; it is only fair that an offender should not be heard to raise the control principle as a shield when a harmful outcome does eventuate.

The former driver (who for convenience shall be called "Tim") is labelled as a *putative* offender rather than a *convicted* one because his negligent act of sleepy driving renders him liable to be convicted of an offence, say, negligent endangerment under s 336(*b*) of the Penal Code and punished thereby. However, it should be noted that Tim avoids legal repercussions only because of epistemic difficulties with law enforcement. The criminal law does not entitle Tim to avoid these legal repercussions – he could very well have been visited with criminal conviction and punishment had he been caught and charged with the offence.

30 There are three possible interpretations of this argument that may be offered, save that upon closer examination they all fail to convince. First, the interpretation to be obtained from a plain reading of the High Court's reasoning is that Tim's avoidance of legal repercussions makes it "only fair" that the outcome materiality principle should operate to the detriment of the other sleepy driver who caused death (for convenience, called "Tam"). But it is unlikely that the High Court intended to mean that Tam should receive a greater punishment on account of what Tim did and got away with – it is perhaps both uncontroversial and widely accepted that "judicially punishing a man for what he is clearly understood not to have done" is "a paradigm case of injustice".[42]

31 Hence, on the second interpretation, perhaps Tim should be left out of the picture; let us focus solely on Tam. The argument now goes that Tam, having caused death, "should not be heard to raise the control principle as a shield when a harmful outcome does eventuate" since he could have avoided legal repercussions and in so doing "take[n] the benefit of legal luck" if no detectable harm had occurred from his sleepy driving. However, the problem with this interpretation is that Tam's benefit cannot be attributed to *legal* luck, but to the earlier mentioned epistemic difficulties. There is no legal luck operating in Tam's favour because even if Tam caused no harm, he is still technically liable to be convicted of negligent endangerment and to be punished accordingly –

41 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [74].
42 G E M Anscombe, "Modern Moral Philosophy" (1958) 33 *Philosophy* 1 at 16.

there is nothing *at law* that entitles him to the benefit of avoiding legal repercussions by virtue of his good luck. Since any such countervailing benefit at law is missing, then there is nothing *at law* that justifies making Tam incur the increased burden in the form of criminal punishment when harm ensues.

32 Finally, on the third interpretation, we might construe the benefit that Tam could have received to be properly that of a "countervailing species of legal luck". The argument, then, would be that Tam could have taken the benefit of legal liability for lesser punishment if no or lesser harm results from his sleepy driving. This being the case, he should not be heard to complain about harsher punishments now that he has caused death instead. However, the problem with this third interpretation is apparent – it is question-begging. The so-called "fairness" of punishing Tam more severely if greater harm ensues on the basis that Tam would have been punished less severely if lesser or no harm ensued presupposes the desirability of resultant legal luck.

33 In any event, regardless of how this argument is interpreted, notice that we inescapably encounter the same problems found in the preceding two arguments. Even assuming that resultant legal luck is fair and desirable, this conclusion does not automatically give us reason to believe that there is resultant moral luck. The various reasons that have been offered so far have only been attempts to justify the relevance of outcomes to the scheme of criminal punishment and D's legal liabilities in respect thereof. However, in order to justify the preference for the outcome materiality principle for the purpose of endorsing resultant moral luck, the courts must explain, specifically, why outcomes matter to the extent of D's blameworthiness in respect of the offence.

B. The misapprehension of the outcome materiality principle

34 Next, it is submitted that a second difficulty with the courts' endorsement of resultant moral luck is that they have misapprehended the true nature of the outcome materiality principle.

35 The outcome materiality principle, which articulates the intuitive moral sense that outcomes matter to moral judgments, does not in fact lend support to the claim that there is resultant moral luck. Recent empirical findings have shown that there is in fact little evidence of any such intuitive moral sense that the outcome of D's wrongdoing *directly* affects our moral judgments of *the extent of* his or her blameworthiness

in respect thereof.[43] For example, participants across studies conducted by Markus Kneer and Edouard Machery were presented with two equally negligent actors, only one of whom caused harm. It was reported that "a very large majority of people" had judged both negligent actors to be *equally* blameworthy despite the differences in harm caused by their identical acts.[44] This strongly suggests that there is, in the first place, no such widely shared intuition that outcomes directly affect moral judgments about the extent of D's blameworthiness – contrary to what has commonly been assumed.

36 Now, none of this is to say that the intuitive moral sense as described by the outcome materiality principle is invalid or completely non-existent. The position is slightly more nuanced – outcomes are still *indirectly* significant to judgments about the extent of D's blameworthiness in so far as outcomes are *epistemic proxies* for the manner and motivations of D's involvement in the criminal act, that is to say, the level of D's culpability (defined in the stipulative sense[45]) as assessed by the situation *ex ante*.[46] It is important to note that Kneer and Machery also found from their empirical studies that participants who were presented instead with *either* one of the two negligent actors (as opposed to both) generally adjudged the negligent actor who caused a harmful outcome to be more blameworthy. Nevertheless, these differences in judgments about the extent of blameworthiness were attributable to "performance error" where "people view the unlucky agent as more negligent than the lucky agent, and they view the former as more negligent because they consider the probability of the bad outcome's occurrence in the unlucky situation as higher than in the lucky situation".[47] As Kneer and Machery explain:[48]

> When attempting to assess the *ex ante* probability of an accident in non-comparative situations … people fall prey to the hindsight bias … as their judgments are inappropriately influenced by outcome information. They exaggerate the accident probability in the unlucky case, deem the unlucky agent as more negligent than the lucky one, and consequently judge her more harshly … The distinct assessment of the morally lucky and unlucky agents

43 See, *eg*, Markus Kneer & Edouard Machery, "No Luck for Moral Luck" (2019) 183 *Cognition* 331 and Heather C Lench *et al*, "Beliefs in Moral Luck: When and Why Blame Hinges on Luck" (2015) 106 Brit J Psychol 272.

44 Markus Kneer & Edouard Machery, "No Luck for Moral Luck" (2019) 183 *Cognition* 331 at 346.

45 See text accompanying n 41 above.

46 Judith Jarvis Thomson, "Morality and Bad Luck" (1989) 20 *Metaphilosophy* 203 at 213; David Enoch & Andrei Marmor, "The Case Against Moral Luck" (2007) 26 Law & Phil 405 at 415–416.

47 Markus Kneer & Edouard Machery, "No Luck for Moral Luck" (2019) 183 *Cognition* 331 at 346.

48 Markus Kneer & Edouard Machery, "No Luck for Moral Luck" (2019) 183 *Cognition* 331 at 346.

> in non-comparative contexts, this is to say, is not a manifestation of moral competence; it is a performance error.

37 To illustrate how moral judgments may be influenced by such "outcome information", suppose that Brian's vehicle ran the red light at a controlled junction and ploughed into other vehicles with the right of way. The outcome of such a collision was tragic: a person died and several others suffered serious injuries. Having heard news of this tragedy, there is a tendency on our part to arrive at potentially mistaken judgments about Brian's blameworthiness – we assume that Brian must have either deliberately ran the red light or failed to keep a lookout for the traffic light signals. Even if Brian inadvertently ran the red light, some may still blame Brian for being "heedless or indifferent towards risk" on the basis that "the risk is clear: If a driver drives into the junction when the traffic lights are not in his favour, there would be a clear possibility of an accident as well as other undesirable (even horrendous) consequences ensuing"[49] [emphasis omitted].

38 Yet, notice here that these judgments about Brian's blameworthiness are formed only from outcome information, in that they are made even without any direct information about how or why Brian came to run the red light as he did. In this regard, Neil Levy explains that "harm contributes independently to blame responses" because:[50]

> … there is a sufficiently high correlation between causing and intending harm in a range of circumstances, we are disposed to take the causation of harm as a sufficient condition for some blame in those circumstances.

While Levy speaks here of "intending harm", his broader point is that the outcomes of D's criminal acts are more generally relied on as a matter of intuition as proxies for moral evaluations of D's culpability.[51] Indeed, this was also recognised in *Public Prosecutor v Koh Thiam Huat* where the High Court remarked that "if there is a high level of harm caused by an accused's dangerous driving … the accused's corresponding culpability is unlikely to be low in such cases".[52] In this regard, it may be appropriately recognised there is an intuitive moral sense that outcomes matter given that "[w]e are sometimes justified in taking consequences into account

49 *Jali bin Mohd Yunos v Public Prosecutor* [2014] 4 SLR 1059 at [21].

50 Neil Levy, "Dissolving the Puzzle of Resultant Moral Luck" (2016) 7 Rev Phil & Psychol 127 at 132.

51 Neil Levy, "Dissolving the Puzzle of Resultant Moral Luck" (2016) 7 Rev Phil & Psychol 127 at 129. In Levy's words, D's "quality of will", referring to "the regard for morality and for the moral status of others" that D demonstrates by his or her act.

52 *Public Prosecutor v Koh Thiam Huat* [2017] 4 SLR 1099 at [43].

in assessing the blameworthiness of agents because consequences are proxies for agents' [level of culpability]".[53]

39 However, it is worth noting that while outcomes may often serve as reliable proxies for D's culpability, this is not *always* the case. Suppose for instance that further investigations reveal that Brian suffered from a transient period of loss of consciousness at the material time that he could not have reasonably known about or avoided. Brian cannot then be adjudged culpable for running the red light and causing the collisions and, in turn, would not deserve any blame, notwithstanding the extent of harm that resulted. Therefore, any prior judgments that we formed about the extent of Brian's blameworthiness that were based on the outcome information should be set aside.[54]

40 This appreciation of the only-indirect moral significance – or more accurately, epistemic significance – of outcomes to judgments about the extent of D's blameworthiness can helpfully reconcile the existence of the intuitive moral sense as stated in the outcome materiality principle on the one hand, with empirical findings that outcomes do not actually bear directly on moral judgments about the extent of D's blameworthiness on the other.[55] Further, it goes to show that the outcome materiality principle has been misapprehended and, as such, overstated – it does not go so far as to support the existence of resultant moral luck. Therefore, as concluded by Kneer and Machery, "[i]n contrast to what philosophers standardly assume, very few people share the Difference Intuition [*ie*, the intuition that outcomes affect the extent of D's blameworthiness] … there simply is no Puzzle of Resultant Moral Luck".[56]

41 To be sure, there may be concerns that if D is not treated as more blameworthy and, following which, is also not punished more severely whenever his or her criminal act results in greater harm, then surely the criminal law would fail to (a) properly blame D for the seriousness of the offence, especially for the harm that was caused to the victim ("V"); as well as (b) to hold D accountable in respect thereof. However, such concerns are unfounded – even if we accept that D's causing greater harm by the criminal act does not make him or her more blameworthy, there

53 Neil Levy, "Dissolving the Puzzle of Resultant Moral Luck" (2016) 7 Rev Phil & Psychol 127 at 137.

54 Neil Levy, "Dissolving the Puzzle of Resultant Moral Luck" (2016) 7 Rev Phil & Psychol 127 at 137.

55 See also the engagement view presented in James Edwards & Andrew Simester, "Crime, Blameworthiness, and Outcomes" 39 OJLS 50.

56 Markus Kneer & Edouard Machery, "No Luck for Moral Luck" (2019) 183 *Cognition* 331 at 347. See also Neil Levy, "Dissolving the Puzzle of Resultant Moral Luck" (2016) 7 Rev Phil & Psychol 127 at 137–138.

are two means by which D can still be held accountable *for* causing such harm by the criminal act.

42 First, D may be properly blamed for causing such harm because the exact wrong that D is being blamed for committing is dependent on the outcome of the criminal act. To illustrate, recall from Choo J's illustration in *Lai Jenn Wuu* that both A and B attempted to kill their respective victims, but only A was successful in his attempt. It is commonly accepted that the differences in the outcomes of their respective attempts make A and B responsible for different wrongs – A, for *killing*; and B, for only *trying* to kill – and that this distinction in respect of their wrongdoing is widely felt. For instance, the fact that A killed his victim is something that the vast majority of us might regard as more serious and thus feel sorrow and regret; whereas we feel relieved that B failed in his attempt. In this regard, a criminal law that aims at publicly and accurately communicating blame to offenders for the wrongs they commit should reflect these widely felt distinctions by regarding A and B as blameworthy for different wrongs, with A being blamed for committing a more serious wrong as compared to B.[57]

43 However, while this morally significant distinction in respect of A and B's wrongdoing affects the *content* of their respective blameworthiness judgments ("what is the wrong that we are blaming them for?"), it does not follow that this distinction necessarily affects the *severity* of their respective blameworthiness judgments ("how much should we blame them for their wrongdoing?").[58] Granted, proponents of resultant moral luck argue otherwise, predominantly on grounds that there exists a strong intuitive force that the differences in outcomes matter to moral judgments about the extent of one's blameworthiness. Yet, as we already saw, the true nature of this moral instinct has likely been misapprehended and, hence, the intuitive significance of outcomes to the severity of blameworthiness judgments should not be overstated. Therefore, proponents of resultant moral luck have not quite proven that D ought to be regarded as more blameworthy just because greater harm results from the criminal act.[59] This being the case, it would not

57 James Edwards & Andrew Simester, "Crime, Blameworthiness, and Outcomes" 39 OJLS 50 at 63–65.

58 A P Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford University Press, 2021) ch 14.

59 That said, it must be acknowledged that this article does not go so far as to positively establish that the severity of blameworthiness judgments is unaffected by outcomes. This task is beyond the aims of this article, which is concerned only with highlighting the difficulties of the Singapore courts' reasons for appealing to resultant moral luck for the purposes of defending resultant legal luck in respect of our sentencing practices. So long as compelling justifications for resultant moral luck cannot be

(cont'd on the next page)

be appropriate to convey the differences in respect of the content of blameworthiness judgments by imposing on A and B different measures of retributive punishment as doing so implies that A is *more* blameworthy than B.

44 Instead, it is helpful to observe that punishment is hardly the only way that the criminal law communicates blame to offenders. The criminal conviction, which formally brands D as a criminal and connects him or her to the precise wrong for which he or she culpably commits, is an equally important mechanism of communicating blame in the criminal law. In this regard, differences in the seriousness of A and B's wrongdoing – the content of blameworthiness judgments – could be more appropriately and adequately communicated by the distinct offences of which we convict them and, in so doing, blame them for committing.[60] This is precisely why A and B should not be convicted of the same offence of "wrongful homicidal behaviour",[61] even though from a retributivist standpoint, they may still be said to deserve the same punishment. Rather, B is labelled an "attempted murderer", whereas A is labelled a "murderer" specifically to communicate blame to him for the fact that he culpably wronged V in a way that B did not do to his own intended victim.

45 Second, holding D accountable for the harm caused to V should be understood beyond the narrow and blunt strictures of blame. In so far as the concern is that V's interests have been harmed, blame as well as demands for the infliction of a greater degree of deprivation of D's liberties by V and his or her sympathisers may be unavoidable, but even so the sentencing court should be cautious about being too "influenced by the prevailing mood or passions of the day".[62] It should not be forgotten that an important way by which D is held accountable is to recognise his or her obligations to redress V's harm. Depending on the

located, then it would be prudent not to presuppose the validity of resultant moral luck given the material implications that such endorsement may have on the way that offenders are blamed and punished by the criminal law, as discussed in Part V below.

60 A P Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford University Press, 2021) at pp 338–340. V K Rajah JA in *Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 1082 observed to a similar effect (at [17]) that "[i]mprecision in convictions will result in rough and arbitrary justice which ultimately serves no positive purpose either to the public or, for that matter, to the accused".

61 As Joel Feinberg suggests in "Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It" (1995) 37 Ariz L Rev 117 at 119. See also Andrew Ashworth, "Taking the Consequences" in *Action and Value in Criminal Law* (Stephen Shute, John Gardner & Jeremy Horder eds) (Oxford University Press, 1993) at p 107.

62 *Public Prosecutor v Zulkifli bin Omar* [1998] 6 MLJ 65.

circumstances, the fact that D caused harm to V by his or her criminal act often means that D incurs secondary moral duties to redress V's harm by way of compensation, this being based on "respect for the rights of the person hurt or harmed in a given case".[63] In this regard, D should – and perhaps, more appropriately than blame and punishment[64] – be held legally accountable by holding him or her to such duties, whether by way of civil liability to compensate V, or even by compensation orders made by the criminal court at sentencing.

V. Steering clear of resultant moral luck: Concerns and implications

46 Given these difficulties, it is respectfully submitted in this article that it is prudent for the courts to steer clear from this rhetoric that "the outcome materiality principle trumps the control principle" or any similar suggestion that relies on the notion of resultant moral luck. In this connection, two concerns may be expressed in response to this proposal.

A. Resultant moral luck: Too entrenched in the criminal law to be disregarded?

47 The first is the concern raised by the High Court in *Lai Jenn Wuu* – that notwithstanding the difficulties with beliefs in resultant moral luck, such beliefs are "too entrenched a feature of the criminal law to be disregarded".[65] But to describe such beliefs to be an entrenched feature of the criminal law seems to be overstated. It bears mentioning that references to resultant moral luck by the courts in Singapore are relatively recent, having only been made in the past decade or so. Whilst the taking account of the outcomes of D's criminal act in sentencing may be appropriately described as "entrenched", this points to resultant legal luck as distinct from resultant moral luck. In any event, even if resultant moral luck is entrenched in the criminal law but has been revealed to be based on a fundamental misapprehension of the outcome materiality principle and the moral intuition that it articulates, then surely it is

63 D N MacCormick, "The Obligation of Reparation" (1977–1978) 78 *Proceedings of the Aristotelian Society* 175 at 176.

64 It is worth brief mention that there is some empirical evidence that suggests that both victims and third parties prefer restorative responses like compensation over punitive ones: see, *eg*, Joseph Heffner & Oriel FeldmanHall, "Why We Don't Always Punish: Preferences for Non-punitive Responses to Moral Violations" (2019) Sci Rep 13219 and Janne van Doorn *et al*, "An Exploration of Third Parties' Preference for Compensation over Punishment: Six Experimental Demonstrations" (2018) 85 Theory Decis 331.

65 *Lai Jenn Wuu v Public Prosecutor* [2013] 4 SLR 1134 at [4].

uncontroversial to say that the sentencing court has a duty to jettison such beliefs and "to point the way forward with reason as its guide".[66]

B. Radical reforms to sentencing practices?

48 Separately, there is also the concern that without endorsing beliefs in resultant moral luck, this would lead to seismic reforms to existing sentencing practices. Admittedly, there may be good reasons to take a conservative approach towards such reform. As David Lewis explains:[67]

> Maybe it is a good idea to stay with the practice we have learned to operate, lest a reform cause unexpected problems. Maybe it is good for people to see the law go on working as they are accustomed to expect it to. Maybe a reform would convey unintended and disruptive messages …

49 In this regard, might departing from resultant moral luck entail that the actual harm caused is irrelevant to the measure of retributive punishment imposed on offenders? More significantly, does this also mean that outcomes should be altogether irrelevant for purposes of calibrating the severity of punishment to be imposed on D – that is to say, that there should be no resultant legal luck in respect of criminal punishment? Neither necessarily follows.

(1) Outcomes and retributivism

50 As we have seen, resultant moral luck – if properly defended – can offer a useful retributivist argument for resultant legal luck on the grounds that the extent of harm caused by D influences the amount of blame deserved as communicated to him or her through retributive punishment. Conversely, steering clear of beliefs in resultant moral luck means that the courts may no longer avail themselves to this argument. Instead, the amount of blame that D deserves as communicated by the severity of retributive punishment should be proportionate only to the level of D's culpability in respect of the offence.

51 However, while understanding the retributivist aim of punishment as being concerned with communicating the blame that D deserves is a popular account as well as the one that has been discussed throughout this article, it is certainly not the only account that seeks to explain why, as a matter of retributive justice, D deserves to be punished

66 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [46].
67 David Lewis, "The Punishment that Leaves Something to Chance" (1989) 18 Phil & Pub Aff 53 at 54.

for the offence.[68] There are other retributivist accounts that do not tie D's deserved punishment with moral judgments about the extent of his or her blameworthiness, but with reference to other criteria. For example, some retributivist accounts claim that D obtains an unfair advantage by engaging in the relevant criminal act, and therefore deserves to be imposed a burden in the form of punishment in this regard to offset that advantage.[69]

52 In this regard, these other retributivist accounts could offer a solution in terms of explaining why the retributive punishment that D deserves must still be proportionate to the harm caused by the criminal act, without having to appeal to any notion of resultant moral luck.[70] There is not the space in this article to explore whether such accounts exist. However, looking elsewhere may offer retributivist grounds for the courts to justify resultant legal luck that are more promising than going through an endorsement of resultant moral luck.

(2) Non-retributivist grounds for resultant legal luck

53 In any event, even if no such retributivist account can be located as a suitable substitute, this does not prove fatal to resultant legal luck in respect of our sentencing practices – outcomes may still be justifiably relevant in sentencing on non-retributivist grounds. Indeed, many of the arguments in *Hue An Li*, although irrelevant for purposes of resolving the philosophical issue of resultant moral luck, were essentially based on non-retributivist grounds for resultant legal luck, *eg*, legislative intent and the consequentialist objectives of criminal punishment.

54 A note of caution should be expressed at this point. For starters, it should be conceded that placing reliance on arguments from legislative intent *prima facie* justifies the courts to take into account the outcomes of D's criminal acts in so far as the courts are obliged to exercise their

68 See generally Andrew von Hirsch, "Proportionality in the Philosophy of Punishment" (1992) 15 *Crime & Justice* 55.

69 See, *eg*, Herbert Morris, "Persons and Punishment" (1968) 52 Monist 475 and Jeffrie Murphy, "Retributivism, Moral Education, and the Liberal State" (1985) 4 Crim Just Ethics 3.

70 See, *eg*, Michael Davis, "Why Attempts Deserve Less Punishment than Complete Crimes" (1986) 5 Law & Phil 1, where Davis argues that unsuccessful attempters deserve lesser punishment than successful ones on the grounds that a "licence" to succeed which has been unfairly obtained is valued more by the criminal than a "licence" to try and fail. But see also objections by Jeffrie Murphy & Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, 1998) at pp 115–116 and Sanford Kadish, "Foreword: The Criminal Law and the Luck of the Draw" (1994) 84 J Crim L & Criminology 679 at 694.

sentencing discretion in accordance with legislative policy.[71] However, it should be noticed that such argument is, in the final analysis, an incomplete and rather unsatisfactory justification for resultant legal luck *vis-à-vis* criminal punishment. All it does is to shift the onus on Parliament to articulate a justification for this legislative policy. It still needs to be asked: why has Parliament chosen to scale punishments according to the harm caused by D's criminal act?

55 A common explanation may be found in the consequentialist aims of criminal punishment.[72] Legislative policy can often be attributed to the benefits of general deterrence that is apparently obtained thereby. For instance, during the second reading of the Road Traffic (Amendment) Bill,[73] it was said that there was a "need to raise sentencing norms for egregious irresponsible driving offences, *particularly those that result in death or some form of permanent disabilities*" as part of an "enhanced approach" that would generate "stronger deterrence against irresponsible driving"[74] [emphasis added].

56 In a similar vein, it may be recalled that the High Court claimed in *Nickson Guay* that Parliament's aim in prescribing harsher punishments on negligent drivers who caused death is "to deter … unnecessary and unavoidable killings by motor vehicle drivers".[75] In fact,

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71 See text accompanying n 35 above.

72 There may also be other explanations that cannot be evaluated more fully in this article. Two examples are mentioned here. First, it is that (see *R v Nottingham Crown Court, ex parte Director of Public Prosecutions* (1996) 1 Cr App R (S) 283 at 288):

> … the court should take into account when considering the gravity of the offence and the appropriate sentence, the consequences to the victim … because one of the purposes of the criminal law is to assuage the feelings of victims and their friends and relations. The law must redress their grievance by inflicting an appropriate punishment and then there is no excuse for the victim or his friends to exact their own retribution.

See also John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) at pp 213–214, where it is argued that the justifiability of criminal punishment "is closely connected with the justifiability of our retaliating (tit-for-tat, or otherwise) against those who wrong us" in that such institutionalised practices "tend to take the heat out of the situation and remove some of the temptation to retaliate, eliminating in the process some of the basis for excusing those who do so". Second, even if, as a matter of retributive justice, outcomes cannot affect the severity of punishment that offenders deserve, yet the courts may justifiably offer discounts to those who cause less harm as an act of mercy: see Michael Davis, *To Make the Punishment Fit the Crime: Essays in the Theory of Criminal Justice* (Westview Press, 1992) at p 204. But see Sanford Kadish, "Foreword: The Criminal Law and the Luck of the Draw" (1994) 84 J Crim L & Criminology 679 at 691.

73 Bill No 13 of 2019.

74 Singapore Parl Debates; Vol 94; Sitting No 106; [8 July 2019].

75 *Guay Seng Tiong Nickson v Public Prosecutor* [2016] 3 SLR 1079 at [44].

deploying arguments based on the consequentialist objectives of criminal punishment need not be initiated from the legislative domain. Even in the absence of any relevant legislative prescription, the courts have also determined that it would be necessary to impose a significantly harsher sentence on D for causing greater harm by his or her criminal act to address the aims of deterrence.[76]

57 That said, it should be observed that there are important concerns that should be addressed in relation to arguments based on general deterrence or any other consequentialist objectives, particularly if it turns out to be difficult or impossible to locate retributivist grounds that can convincingly justify why, as a matter of moral judgment, D deserves to be punished more for causing greater harm by his or her offence. In such circumstances, consequentialist arguments like these run into the familiar moral objection that punishing D in excess of what he or she deserves in order to maximise certain benefits for the public interest is unjustified, for it treats D as means to such ends and fails to accord the respect due as an autonomous agent.[77] Indeed, it was acknowledged by the Court of Appeal in *ADF v Public Prosecutor* ("*ADF*") that "an accused should not be punished *excessively*, even if the wider or broader societal concerns might suggest otherwise".[78]

58 Be that as it may, our courts have, for better or worse, held that this moral objection is not an absolute constraint. The Court of Appeal in *ADF* also observed that "[o]n occasion … the *societal* concerns are so important that they must be given predominant (even conclusive) effect"[79] [emphasis in original]. It seems clear in this regard that such consequentialist objectives would only justifiably displace the moral objection provided that they are "so important" or "particularly compelling".[80] It goes without saying that in order for such considerations to be particularly compelling, it must first be demonstrated that punishing D more severely whenever greater harm results *actually* secures the benefit

76 See, *eg*, *GCP v Public Prosecutor* [2019] 5 SLR 626 at [70].

77 Immanuel Kant, *Metaphysical Elements of Justice* (John Ladd trans) (Hackett Publishing, 2nd Ed, 1999) at p 138:

> Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else … His innate Personality [that is, his right as a Person] protects him against such treatment … He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens.

78 [2010] 1 SLR 874 at [222].

79 *ADF v Public Prosecutor* [2010] 1 SLR 874.

80 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [133].

in question for the public interest, *eg*, deterring others from committing the offence or, perhaps more limitedly, from causing greater harm.

59 It is beyond the task of this article to evaluate whether such relationship between resultant legal luck and the consequentialist objectives of criminal punishment actually exists. Suffice to say for present purposes that even if this were the case, it has not been demonstrated by Parliament or our courts with clear theoretical reasoning or empirical support.[81] In the event that such considerations are to be relied upon as appropriate and adequate justifications aimed at legitimising the infliction of greater punishment on D, then surely the onus is on those imposing such punishment to transparently demonstrate the validity of claims concerning the utility that is apparently promoted thereby.

VI. Conclusion

60 In recent years, the Singapore courts have increasingly explained that outcomes matter to sentencing on grounds that "the outcome materiality principle trumps the control principle". Such justificatory explanation is premised upon the courts' endorsement of resultant moral luck. Yet, it has been argued in this article that the courts should steer clear from relying on such retributivist grounds for resultant legal luck – not only is the underlying intuitive basis for the outcome materiality principle fundamentally misapprehended, the reasons that the courts have given in favour of the outcome materiality principle are also incapable of defending resultant moral luck.

61 However, it must be stressed once more that none of this is to say that the outcomes of D's criminal act are wholly irrelevant to sentencing. Rather, the argument in this article is a comparatively modest one – *viz*, that resultant legal luck in respect of criminal punishment should not be justified through resultant moral luck. Indeed, several other alternative strategies to justify resultant legal luck have been suggested here, and it is respectfully submitted that the courts would be prudent to reconsider its

81 See the similar point made by Chan Wing Cheong in "No Punishment Without Fault: Kindling a Moral Discourse in Singapore Criminal Law" (2013) 25 SAcLJ 801 at para 35. Indeed, there seems to be a paucity of any such evidence to support claims of any such deterrent effect from resultant legal luck *vis-à-vis* criminal punishment: see, *eg*, Sanford Kadish, "Foreword: The Criminal Law and the Luck of the Draw" (1994) 84 J Crim L & Criminology 679 at 684–688; Marcelo Ferrante, "Deterrence and Crime Results" 10 New Crim L Rev 1; and Stephen J Schulhofer, "Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law" (1974) 122 U Pa L Rev 1497. For a general review of the empirical evidence for the effectiveness of deterrence of the severity of punishment, see Daniel S Nagin, "Deterrence in the Twenty-First Century" (2013) 42 Crim & Just 199.

approach and explore these alternatives as potential justification for this sentencing practice.